

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 ----- X
4 :

5 IN RE: JOHN DOE,

CV 98-1101

7 :

United States Courthouse

8 Brooklyn, New York,

10 :

July 20, 2010

11 ----- X 10:30 o'clock a.m.

12 TRANSCRIPT OF ORAL ARGUMENT
13 BEFORE THE HONORABLE I. LEO GLASSER
14 UNITED STATES DISTRICT JUDGE

14 APPEARANCES:

15 For the Plaintiff: MORGAN LEWIS & BOCKIUS, LLP
16 101 Park Avenue
17 New York, N. Y.
18 BY: KELLY MOORE, ESQ.
LESLIE R. CALDWELL, ESQ.
DAVID A. SNIDER, ESQ.
BRIAN A. HERMAN, ESQ.

19 For the Defendant: WILSON ELSEER MOSKOWITZ EDELMAN
20 & DICKER, LLP
21 150 East 42nd Street
22 New York, N. Y. 10017
23 BY: RICHARD LERNER, ESQ.
24 LAUREN J. ROCKLIN, ESQ.

25 Court Reporter: Henry R. Shapiro
225 Cadman Plaza East
Brooklyn, New York
718-613-2509

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1
2 THE CLERK: Criminal cause for oral arguments, '98
3 CR 1101, United States versus John Doe.

4 State your names for the record

5 MS. MOORE: Kelly Moore, Leslie Caldwell, Brian
6 Herman and David Snider for John Doe

7 MS. LERNER: Richard Lerner of Wilson, Elser,
8 Moskowitz, Edelman & Dicker for respondent Frederick M.
9 Oberlander

10 MS. MOORE: Your Honor, with respect to the relief
11 we seek, we rely on our brief, the arguments contained
12 therein and the authority contained therein.

13 Specifically Judge Jones' decision in the Visa case
14 and Judge Weinstein's decision in the Zyprexa case.

15 If anything, the facts of this case are more
16 compelling than those cases. Visa and Zyprexa involved
17 sealed documents in civil litigation, which involved possible
18 commercial or economic harm to a business entity.

19 This case, as the Court is aware, involves potential
20 physical harm or death to an individual. With respect to the
21 First Amendment arguments, at the last court appearance the
22 Court did not ask us to specifically address that in our
23 briefs. We would like the opportunity to supplement our brief
24 with more detailed First Amendment analysis if that is okay
25 with the Court.

1 In the meantime, I would just note that the first
2 amendment is not absolute. The facts of this case in no way
3 support the conduct of the respondent and the respondent's
4 First Amendment protection. The respondents are not the
5 media, they are not a news gathering organization seeking to
6 write articles and publish them

7 Mr. Oberlander is an attorney. As such, he has
8 additional ethical obligations to not disseminate or use
9 information that is secret, private and confidential, that
10 comes into his possession.

11 Moreover, in this case, the documents at issue were
12 clearly stolen and Mr. Oberlander, who represented the thief,
13 knew that they were stolen.

14 As the agent of a thief, receiving those stolen
15 documents, he doesn't deserve any greater protection-- First
16 Amendment protection-- than the thief himself would.

17 Additionally, the respondent knew that some of the
18 documents were sealed, as is clearly evident from paragraph
19 95 of the complaint in the Southern District.

20 As an attorney, once again, Mr. Oberlander knew what
21 that meant. He knew that documents don't seal themselves,
22 they are sealed only pursuant to court order. And there are
23 also unsealed only pursuant to court order.

24 He was also aware of the Southern District
25 electronic filing rules, which compelled him to exercise

1 caution and care with respect to disseminating information
2 about cooperators. That rule applies to all cooperators,
3 even those who testify publicly. In this case the
4 cooperation and the cooperation agreement were sealed. Mr.
5 Oberlander certainly should have exercised greater care.

6 The intended use of it in this case doesn't support
7 compelling First Amendment interest. I don't know if the
8 Court had the opportunity to review the Southern District
9 Civil RICO complaint. But the information about my client's
10 criminal case in no way supports any claims contained in that
11 case, and it's clearly being used to harass, embarrass,
12 intimidate and coerce my client.

13 Finally, as I mentioned before, this case unlike any
14 of the cases cited by the respondents involving potential
15 danger to human life. Under the facts of this case the First
16 Amendment simply possess no bar to the imposition of the
17 relief we're seeking.

18 With respect to Mr. Oberlander's declaration filed
19 last Friday, I would note that the respondents throughout
20 this proceeding have engaged in a number of dubious
21 litigation tactics, that are arranged in an intentional
22 misinterpretation of the Court's order, without seeking
23 clarification along the lines of claiming that they didn't
24 know. He contacted Mr. Bernstein for an affidavit that said
25 they didn't know the lawyers could review the documents in

1 question in connection with representing the clients.

2 And a previous meritless allegation of misconduct
3 against me. It was withdrawn, but nevertheless made and it
4 was intended clearly to get me to do something that would
5 have been unethical, to put my own interests ahead of my
6 client's by accepting a settlement that wouldn't have been
7 favorable to my client, just to get the unpleasant
8 allegations against myself withdrawn.

9 The declaration of Mr. Oberlander, in which he
10 accuses this Court of unconstitutional conduct and makes
11 application for recusal, is clearly in the same vain of that
12 litigation at that particular time. It is clearly intended
13 to get the Court to do one of two things: To either recuse
14 itself on the basis of a completely meritless application or
15 in the alternatively to get the Court to pull its punches, to
16 bend over backwards, to demonstrate a lack of bias, to issue
17 a ruling that would be favorable to the respondents than if
18 they had not made such a meritless unsupported application.

19 Those litigation tactics should be seen for what
20 they are and respondents and litigants engaging in them
21 should not be rewarded.

22 I thought long and hard about responding to some of
23 the other allegations and arguments contained in this
24 Oberlander declaration, the allegation that this Court has no
25 decency, that somehow it is beyond the authority of a federal

1 judge, upon application of United States Attorney's office,
2 to seal documents or files when doing so is in the interest
3 of protecting human life or national security, or that
4 somehow has a greater First Amendment right to put a man's
5 life in danger by publishing stolen and sealed confidential
6 documents then if he walked into a crowded theatre and
7 shouted fire.

8 In rereading Mr. Oberlander's declaration, however,
9 I was reminded of a comment that a former colleague of mine
10 used to make from time to time, which is that there really is
11 no percentage in arguing with crazy people, and so upon the
12 advice of another wise man I once got, I think, I will let
13 discretion be the greater part of valor and not dignify that
14 declaration or the rants contained therein with a response.

15 If the Court has no additional questions for us, we
16 will rest on our papers, but we would like to supplement them
17 with an additional First amendment analysis.

18 THE COURT: I will come back to you.

19 Let me hear from Mr. Lerner.

20 MS. LERNER: Your Honor has now had an opportunity
21 to read the case law --

22 THE COURT: Before we get to that, I am not
23 altogether clear as to what Mr. Oberlander's notice of appeal
24 is all about. I do not quite understand what is it.

25 MS. LERNER: It's a protective notice of appeal. He

1 reserve his right to argue. There is yet to be a formal
2 permanent injunction or that a TRO -- there is possibly a gap
3 period where it could be argued that the TRO lapsed and
4 became a permanent injunction. It's merely protective.

5 THE COURT: What does that mean, a protective notice
6 of appeal?

7 MS. LERNER: If the TRO could be deemed converted to
8 a permanent injunction, we will appeal from that.

9 THE COURT: Is not that kind of premature? Is there
10 anything that prevents him from filing a notice of appeal
11 when that event occurs?

12 MS. LERNER: If a permanent injunction is issued we
13 shall file a further notice of appeal.

14 THE COURT: What's the purpose of a protective
15 notice of appeal? Is that to preserve some limitation
16 period?

17 MS. LERNER: Frankly, your Honor, the case law --

18 THE COURT: To be perfectly candid --

19 MS. LERNER: Candidly the TRO itself is appealable
20 because it restrains Mr. Oberlander's free speech rights.

21 THE COURT: Then he could file a notice of appeal
22 with respect to what he believes is an order, which is
23 properly appealable.

24 MS. LERNER: Yes.

25 THE COURT: I don't understand what a protective

1 notice of appeal is. I'm frank to say, I have never
2 encountered it before.

3 It may be that my knowledge of this process is a
4 little wanting, but I do not understand what it is.

5 MS. LERNER: First of all, on June 21st your Honor
6 stated that there was a permanent injunction vis-a-vis the
7 PSR and ordered it returned. That is appealable. The notice
8 of appeal refers to that.

9 But since your Honor stated further evidence would
10 be taken after it was stated that it's our position it could
11 fairly be argued that the Court did not actually render a
12 final determination as to that document. If it did --

13 THE COURT: The reason I am asking, Mr. Lerner, is
14 that it is very clearly established law that it may be that a
15 filing of a notice of appeal deprives this Court of
16 jurisdiction with respect to continuing in a matter.

17 I do not know whether a notice of appeal, if filed,
18 would have that effect here with respect to injunctive
19 relief. I think that is something that is questionable.

20 But, in any event, it was that issue which caused me
21 to wonder what is this document about, is it in some way
22 affecting my continuing exercise of jurisdiction in this
23 matter?

24 MS. LERNER: As we stated in the notice of appeal
25 itself, we reserve all of our rights.

1 THE COURT: Neither here nor there.

2 Go ahead.

3 MS. LERNER: Your Honor has read the case law, I
4 presume, that was cited in our papers and would perhaps now
5 agree that the arguments that we have been making are not
6 specious, which is the word that your Honor used at the first
7 hearing. Perhaps your Honor having now read Bartnicki will
8 agree that the analogy to a misdirected check is inapt.

9 In Bartnicki the Court stated quite clearly that
10 while the interceptor of the phone call maybe guilty of a
11 crime, it by know means follows from that that punishing
12 disclosures lawfully obtained and in the public interest by
13 one not involved in the initial illegality is an acceptable
14 means of serving those ends.

15 You cannot punish someone who merely receives
16 allegedly stolen information. It would be quite remarkable
17 if the United States Supreme Court continued to hold speech
18 by a law-abiding possessor of information can be suppressed
19 in order to deter conduct of a non-law-abiding third-party,
20 thus if Mr. Bernstein broke the law, you cannot punish
21 Mr. Oberlander for that.

22 Mr. Oberlander has independent free speak rights.
23 Your Honor, sealing the court file, I submit, was
24 unconstitutional in this case, because there is no signed
25 court order.

1 Hartford says there must be a court order. If your
2 Honor did sign an order, there is nothing in the docket
3 sheet, as far as we can tell, to indicate that prior notice
4 appearing was given prior to the sealing of the court file.

5 We have not had an opportunity to see that docket
6 sheet, therefore, we cannot note whether this case was
7 properly sealed. If notice was given --

8 THE COURT: Excuse me.

9 If you went to the docket you would find that this
10 case is under seal, correct?

11 MS. LERNER: Yes.

12 THE COURT: And in order to obtain documents, which
13 are part and parcel of that case, you would have to make an
14 application to a court to unseal that file. That is what the
15 sealing order says.

16 MS. LERNER: And if the sealing order was not signed
17 by your Honor and the requisite findings were not made, is
18 unconstitutional, and we have been deprived of the
19 opportunity to see the docket sheet and the United States
20 Supreme Court in *Amidao* held we cannot presume what is in the
21 docket sheet if we can't see it. If notice was given, we
22 can't know that because the Court has declined to allow us to
23 see the docket sheet as stated in Hartford. We cannot make
24 any presumption about what it says. The appellate court can
25 make no presumption and we cannot. Therefore, we cannot

1 presume the documents were properly sealed, your Honor.

2 There was nothing on the record that the sealing --

3 THE COURT: Excuse me. Just a minute. Is there
4 some presumption that an order -- assuming that there is an
5 order and you do not know whether the order was or was not
6 signed -- what you do know by looking at the docket sheet is
7 that this is a sealed file, sealed by order of the court.

8 Is there some presumption that the order is invalid
9 because it was not signed, is that what I'm hearing?

10 MS. LERNER: I'm referring to the Hartford case--.

11 THE COURT: Mr. Lerner, I am asking you what I am
12 understanding, is there is a presumption of the invalidity of
13 an order?

14 MS. LERNER: I think, your Honor stated on the
15 record that this is just matter of factly and indicated as I
16 recall it wasn't even signed, it's docket said is sealed. If
17 there is a signed order, let us see it, because without a
18 signed order this proceeding is unconstitutional.

19 THE COURT: It may be, Mr. Lerner, that you are
20 correct. You are not answering the question.

21 MS. LERNER: I don't have to make any presumption.
22 The United States Supreme Court has held the appellate courts
23 do not have to presume there is a signed order in the file
24 when there is--.

25 THE COURT: If there is an order or docket entry

1 that says this has been sealed by order of the court, any
2 person is free to ignore that order and if by some chance,
3 some document in that file becomes available to any person,
4 that person is free to assume that the order has no efficacy?

5 MS. LERNER: First of all, the docket here is
6 sealed, therefore, Mr. Oberlander could not see any order in
7 the file and the answer to your question is, yes, anybody may
8 do it, whatever he wants with that document. It is free to
9 be distributed, if it's a public of interest, criminal
10 proceeding are per se of public interest.

11 THE COURT: It's true that criminal proceeding are a
12 matter of public interest.

13 Doesn't follow that every document that has been
14 created in the course of a criminal proceeding is a matter of
15 public interest available to the public upon request.

16 That is particularly true, as I'm sure you know --
17 Mr. Lerner --

18 MS. LERNER: I apologize for that interruption.

19 THE COURT: I understand your passion in connection
20 with this matter.

21 Let us talk one at a time. Okay.

22 I take it you read Charmer Industries.

23 MS. LERNER: Yes.

24 THE COURT: And I take it that having read Charmer
25 Industries, you would agree that a presentence report is a

1 document which has some very specific confidentiality
2 concerns.

3 MS. LERNER: Your Honor, of course, I agree with
4 that. But the premise, you have asked whether a document
5 could be used for any purpose -- if it's from a criminal
6 trial -- criminal proceeding even if it's sealed, the
7 question is was it stolen from the court file. Was it stolen
8 or inappropriately unauthorized taken from the Court file as
9 in Charmer?

10 The answer is, the Court can order its return. If
11 it's obtained from other means, your Honor, has no
12 jurisdiction to stop it. You can not issue a prior restraint
13 order.

14 If I may continue?

15 THE COURT: Please.

16 MS. LERNER: There is nothing in the record, that we
17 are aware of, because we cannot see the docket sheet or the
18 sealing order. There is nothing on the order finding a more
19 fundamental interest in the First Amendment would be served
20 by sealing this court file. There is nothing on the record
21 finding this was the least restrictive alternative.

22 Your Honor, granting -- now we turn to the TRO
23 itself, as the Court granted a TRO, which constitutes a prior
24 restraint on speech without conducting any inquiry as to
25 whether the respondent's First Amendment rights would be

1 infringed.

2 Now, your Honor, ordered -- the order itself signed
3 by your Honor incorporates Ms. Moore's arguments and it says
4 for the reasons stated, but that is constitutionally
5 insufficient according to Amadao, you must make independent
6 findings to support a prior restraint.

7 It must be the order itself. The TRO is a nullity.
8 Failing to make the requisite findings in the order to show
9 cause, in as much it constitutes a prior restraint, renders
10 that prior restraint unconstitutional.

11 Your Honor failed to disclose to us on the docket
12 sheet that we requested, we cannot know whether these
13 documents are properly sealed --

14 THE COURT: Have you made application to the Court?

15 MS. LERNER: We requested it.

16 THE COURT: Have you made application to me to
17 unseal whatever document you wanted? That docket sheet
18 indicated there were, I think, four or five numbered
19 dockets -- docket entries which were sealed which were
20 unsealed and, I think, made available to you.

21 MS. LERNER: They were not. They were not. Having
22 a dual docket sheet, your Honor stated at the second
23 appearance that there were thirteen items on the docket sheet
24 and six were sealed.

25 Your Honor, that is improper.

1 THE COURT: What was improper?

2 MS. LERNER: Your Honor, you sealed the entire
3 docket, yet you indicated there are thirteen items in the
4 docket, six of which are sealed, which means there are others
5 which are not sealed and yet the entire file has been sealed.

6 Your Honor, if the Court goes beyond the relief
7 sought in the order to show cause there will be a further
8 violation of Mr. Oberlander's constitutional rights for the
9 order to show cause did not seek permanent injunction, did
10 not seek a gag order, there is no basis for such leave. He
11 cannot be gagged.

12 He returned, your honor, the original document that
13 he obtained from Mr. Bernstein.

14 Now, it may not be so clear in the record that he --
15 those were actually the originals obtained from Mr.
16 Bernstein. If the Court would like a representation from Mr.
17 Oberlander to that effect, I would ask that he give it. But
18 those were the originals.

19 Your Honor can do nothing to stop the dissemination
20 of photocopies or electronic copies and the selective
21 enforcement or selective gag order directed only at Mr.
22 Oberlander and not, for example, Business Week, which as we
23 noted in our papers, has on its website an article which
24 states that it has a copy of the criminal -- the sealed
25 criminal complaint in this matter.

1 Your Honor, cannot selectively enforce a gag order
2 against Mr. Oberlander. You cannot gag him and not gag
3 Business Week.

4 If you're going to take on a little guy you have to
5 take on a big guy. He'll not sit here and accept that,
6 neither will I. We will fight this to the end. A permanent
7 injunction cannot be granted.

8 Thank you, your Honor.

9 THE COURT: Do you want to respond?

10 MS. MOORE: Yes, your Honor.

11 I would note we'd like to sort of supplement our
12 brief with an additional Fifth Amendment analysis.

13 THE COURT: Your application is granted to file a
14 supplemental brief.

15 There are a number of things, which are troublesome
16 in this case. Going back to the original order to show
17 cause, that document was troublesome because it just said
18 that there was a significant breach in the processes of this
19 Court with respect to criminal dockets.

20 There was, as I think, indicated on that occasion, I
21 was very concerned about the integrity of the record of this
22 Court and that file. It turns out that the first document on
23 that docket sheet is a notification by an assistant United
24 States attorney of the filing of an information, which
25 eventually evolved into an indictment.

1 There is no indication, that is docket number one,
2 which I obtained or had the clerk obtain from Kansas City or
3 wherever these files are shipped, because it was no longer
4 available in the courthouse. There is not any indication in
5 that document or in a subsequent document that an application
6 was made or request was made in that document to seal that
7 file. Nor have I been able to find any order signed by me,
8 which directed that this file be sealed.

9 Criminal cases such as the John Doe case and cases
10 in which by virtue of cooperation agreements and variety of
11 other matters either national interest, security interest, or
12 significant interest that one may have in his own safety,
13 which may be at risk. Criminal files are sealed where that
14 is a significant consideration.

15 Let us assume for the moment that an order was
16 signed by me somewhere along the line, as it may have been,
17 directing that the file in this case be sealed. That order
18 is directed to whom? Who is bound by it? That order, it
19 would appear, is directed to the clerk of the court who is
20 informed that this document or this file is sealed and is not
21 to be made available, except upon an order of the Court
22 unsealing it.

23 When the order to show cause was first brought into
24 this Court, it was a very serious concern as to whether
25 somebody in this courthouse unsealed that file or made

1 document which were sealed available to third parties. That
2 was a very significant concern.

3 A hearing, which we held some weeks ago, makes it
4 plain and, I think, it is beyond dispute that these documents
5 were not removed by John Doe, he properly had them. The
6 cooperation agreement was a document which was in the
7 possession of his then attorney. His attorney had a perfect
8 right, as did John Doe, to have a copy of that cooperation
9 agreement, had a perfect right to have whatever document
10 pertained to his case, which may have been part of the file.

11 Assume that John Doe decided to make the cooperation
12 agreement, the proffer agreement available to a third-party,
13 would an order have been violated? The answer is clearly,
14 no. John Doe had these documents, so the testimony has thus
15 far revealed, Mr. Bernstein has not submitted an affidavit
16 nor has he testified. You cannot find him for the purpose of
17 serving the subpoena.

18 What we have on the record is the testimony by John
19 Doe that he did not give those documents to Mr. Bernstein,
20 which gives rise to the legitimate inference that Mr.
21 Bernstein may have stolen them, may have improperly obtained
22 those documents.

23 What order of the Court was violated by that event?
24 Those documents then came into the hands of Mr. Oberlander.
25 Mr. Oberlander knew that those documents were sealed

1 documents, contained very, very serious information and his
2 assertion or testimony that, well, it wasn't his words, it
3 was his client's words, is remarkable for it's disingenuous.
4 To say that I am not a criminal lawyer and I don't know what
5 it meant, I have a sealed document, is preposterous.
6 Particularly, since he had the electronic filing information
7 from the Southern District that said if it's a cooperation
8 agreement, be very, very careful before you use it.

9 Now, what happened, assuming that the documents were
10 in John Doe's cabinet or in his desk, as they had a perfect
11 right to be, they were his documents, and the documents were
12 then wrongfully taken by Mr. Bernstein. Mr. Bernstein is a
13 converter, Mr. Bernstein has no title to those documents, no
14 legal right to those documents, to that tangible document
15 whether it would be a piece of paper, whether it be a gold
16 ring or whatever it is, it was a tangible item which was
17 converted, given the testimony that I have by Mr.
18 Bernstein --

19 MS. LERNER: John Doe, I believe. Bernstein did not
20 testify.

21 THE COURT: I am saying based on the testimony. Mr.
22 Bernstein then analogizing these events to the fundamental
23 principle of conversion, or larceny, if you will, past it
24 onto Mr. Oberlander.

25 Mr. Oberlander had no better right to those

1 documents than Mr. Bernstein had. If we were to describe
2 this change of events in terms of property rights, title, Mr.
3 Bernstein had no title and he had no title to give to Mr.
4 Oberlander.

5 Mr. Oberlander even if he were an innocent purchaser
6 for value, would not have acquired title to those documents,
7 because Mr. Bernstein had no title to give him. If requests
8 were made of Mr. Oberlander to return those documents and Mr.
9 Oberlander refused, it may be that an action for conversion
10 may be available against Mr. Oberlander.

11 It may be that there is some disciplinary rule,
12 which might be applicable to Mr. Oberlander, who had
13 documents which he knew or perhaps should have known may have
14 been improperly obtained by Bernstein and passed onto him.

15 It may be that there is some ethical principle,
16 which should have precluded Mr. Oberlander from using those
17 documents. Because the sensitivity of those documents would
18 have been apparent to any reasonable person, particularly one
19 who is trained in the law ostensibly.

20 So the question is, yes, something bad was done,
21 something very bad and perhaps despicable was done by the use
22 of those documents annexed to a complaint in the Southern
23 District, in a civil case, but the question is what order was
24 violated?

25 You can certainly submit briefs on the First

1 Amendment issue. I have some question about whether the
2 First Amendment is applicable here. There was an opinion by
3 Judge Kahn in the Western District-- I did not bring my file
4 down. I thought this was on for 11:30. What is the name of
5 the town -- I will be more than happy to give it to you.

6 LAW CLERK: It was a Northern district case.

7 THE COURT: Yes, it was by Judge Kahn, in which he
8 has a very interesting discussion in a case, which is not
9 this, but analogous in the sense that it involved a
10 confidentiality order that was part of a potential settlement
11 stipulation and that the documents in that confidentiality
12 agreement became available or was sought to be made available
13 to a newspaper upstate by the reporter of that newspaper and
14 the First Amendment argument was made in that case as well.

15 Judge Kahn didn't think it was applicable for a
16 variety of reasons. I think, his reasoning might be quite
17 persuasive when dealing with a presentence report and
18 certainly Charmer, I think, leaves very little doubt that a
19 presentence report has a very, very special status. So there
20 we are.

21 You want an opportunity to submit the supplemental
22 brief and I will give you that opportunity. I just received
23 Mr. Lerner's document this morning. It was FAX'D or ECF'd at
24 four something last night. You don't request an adjournment
25 at 4:00 o'clock on the eve of a hearing. If you look at my

1 local rules it require 48 hours notice for purposes of
2 adjourning a schedule hearing or a conference.

3 So I didn't get around to reading it because I left
4 before that document arrived and I looked at it this morning.

5 Ms. Moore called, I think, shortly after that
6 document was received, so my law clerk tells me, and asked
7 for an adjournment to respond to that letter. I was not able
8 to respond to that because I was not here. But I did call
9 her this morning and I asked her if she wanted to adjourn.
10 You indicated that you saw no purpose for this conference as
11 well, but she preferred to go ahead and make application for
12 a supplemental brief.

13 What I have just declared is not to be understood at
14 this moment as a determination that injunctive relief may not
15 be appropriate, but I am troubled by the issues as I have
16 outlined them as to whether an order signed by a judge on one
17 of those sealing envelopes, which says, not to be unsealed
18 except by order of the Court, is binding upon any third-party
19 person, is binding or is the procedure, which is intended by
20 that procedure, which informs any third-party who has notice
21 or will have notice by looking at a docket sheet, looking at
22 the ECF, this is a case under seal -- under sealed or filed
23 under seal-- make application to the Court to unseal the
24 document.

25 Whether having knowledge that the case was one,

1 which has been filed under seal, whether an order was issued
2 or not, it is a case which is filed under seal, and clearly
3 indicates the content of that sealed file is not to be
4 disclosed, except upon order of the Court, whether that can
5 be ignored, whether that is presumptively meaningless and has
6 no binding effect upon anybody.

7 It is an interesting question, Mr. Lerner. Judge
8 Kennedy who I think you were quoting with all due respect,
9 may not have faced this specific issue at any given time, but
10 it is obviously an issue which is quite troublesome. It is
11 quite troublesome in so far as Mr. Oberlander's use of that
12 document, which he knew was sealed, knew contained very
13 sensitive information. It may be some other relief may be
14 available against Mr. Oberlander. I am not sure.

15 In so far as injunctions are concerned, there is an
16 interesting observation in Charmer as well, if you read it
17 carefully, Mr. Lerner, and I'm sure that you have. Normally
18 was is required, and Ms. Moore indicates what is normally
19 required before injunctive relief is obtained-- and by the
20 way in so far as the TRO is concerned-- I do not recall there
21 was any objection ever raised by you to the issuance of the
22 TRO.

23 It is my sense that you were consenting to it at
24 every stage of the TRO as it was initially issued and
25 renewed. We will leave that go for the moment.

1 MS. LERNER: I can respond --

2 THE COURT: I said, leave that go for the moment.
3 But normally, before a TRO-- injunctive relief, more
4 specifically should be issued, there are three prerequisites.
5 The leading case in this circuit is Jackson Dairy versus H.B.
6 Hood, I think, it is 570 2d or thereabouts. You have to
7 show irreparable harm, likelihood of irreparable harm,
8 likelihood of success on the merits, or reasonable issues
9 going to the merits with the balance of hardships tipping in
10 favor of the movant.

11 In Charmer, you may recall-- it may be Judge Kearse
12 who said that the burden should not be on the person seeking
13 the injunctive relief, where the presentence report is the
14 document at issue, the burden should be upon the Attorney
15 General, the person who has that presentence report to
16 establish an overriding need for the use or possession of
17 that document.

18 The burden should be on the other side, not on the
19 movant, but the person seeking to be enjoined.

20 Having said all of that I will await further
21 briefing. I do not think there is anything further that you
22 want to submit, Mr. Lerner.

23 MS. LERNER: There are two cases I would like to
24 cite and just --

25 THE COURT: Why don't you submit them to me.

1 MS. LERNER: I don't have copies for --

2 THE COURT: When I say submit them, submit the
3 citations to them.

4 MR. LERNER: DiPietro against the United States of
5 America.

6 THE COURT: I'm sorry --

7 MS. LERNER: D I P I E T R O.

8 It is a Lexus cite, 2009, U.S. District --

9 THE COURT: What are the names of the parties?

10 MS. LERNER: DiPietro against the United States of
11 America.

12 THE COURT: DiPietro is the plaintiff?

13 MS. LERNER: Petitioner for the unsealing of the
14 Court file. 2009, US District, Lexus 30010.

15 THE COURT: What court was it.

16 MS. LERNER: Southern District.

17 And the second case is Nycomeds against Glen Parker
18 Generics, 2110 U.S. district, Lexus 20788.

19 It is a magistrate decision , Eastern District of
20 New York, Magistrate Mann.

21 THE COURT: You want a week?

22 MS. MOORE: Yes, your Honor.

23 THE COURT: You are responding to Mr. Lerner's last
24 submission and I don't think any further submissions are
25 necessary.

1 MS. MOORE: Your Honor, in light of Mr. Lerner's
2 last submission, I would seek clarification with respect to
3 the PSR that it's clear --

4 THE COURT: Before you get to that. Am I correct
5 that the documents, at least Mr. Lerner's last submission
6 says this whole proceeding now is moot because the documents
7 have been surrendered, turned over to you, is that correct?

8 MS. MOORE: Not that I know of. I think, as I
9 understand his position, which I don't agree with, he's
10 entitled to keep all copies of the documents, as long as he
11 returned the originals, so, I believe, in his letter he
12 states that if at the court proceeding he marked as exhibits
13 the original versions of those documents, but his client has
14 maintained both electronic and hard copies, so clearly the
15 intent was not to give back, as Judge Jones ordered in Visa,
16 all copies as well. It doesn't get the originals back and
17 are free to disseminating copies.

18 THE COURT: I think, I indicated Mr. Oberlander
19 should not do that. I think it was in the form of an order
20 and that order, I believe, if I have not done so, I am doing
21 it now and if you want it in writing until I resolve this
22 issue.

23 MR. LERNER: You are issuing a further TRO?

24 THE COURT: Yes, I am.

25 I'm issuing a further TRO for the reasons that I

1 have indicated.

2 I think there is irreparable harm, which is imminent
3 to Mr. John Doe, those documents contained information which
4 is highly, highly sensitive and if disseminated it is
5 discriminatively to a person that should not get the
6 information.

7 I think, it would put Mr. John Doe's safety at risk.
8 The likelihood of success is or is not present. Again, if
9 Charmer Industries is being read correctly by me and, I think,
10 it is, I think, the burden with respect to whether or not
11 there is some need to maintain those documents or to keep
12 them should be shifted to you. Until next week, okay.

13 I do not think we need any further hearing. You will
14 submit the briefs and I will make my determination. The TRO
15 is continued for another ten days.

16 Is there anything further?

17 MS. MOORE: No, your Honor.

18 THE COURT: Thank you.

19 MS. MOORE: I do have one last application. With
20 respect to the transcript to have my client's name replaced
21 with John Doe.

22 THE COURT: Yes.

23 MS. MOORE: Thank you.

24 *****

25

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